Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1529

ROBERT HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

UNITED STATES OF AMERICA ex rel. TIMOTHY MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

ROBERT HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

UNITED STATES OF AMERICA ex rel. TIMOTHY MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert Henderson, Superintendent of the Auburn Correctional Facility, Auburn, New York, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Timothy Morgan* v. *Robert Henderson,* which was decided on May 12, 1975.

Opinions Below

The decision of the Court of Appeals which petitioner seeks to review was a summary affirmance dated May 12, 1975, of a memorandum-decision and order of the United States District Court for the Northern District of New York, dated October 29, 1974. The memorandum-decision

and order of the District Court is not reported. The decision of the Court of Appeals is reproduced as Appendix A and the memorandum-decision and order of the District Court is reproduced as Appendix B. The order of the District Court dated October 29, 1974, was preceded by a Court of Appeals decision dated December 12, 1973, reversing and remanding for an evidentiary hearing an earlier decision of the District Court dated September 26, 1973. These latter decisions are reproduced as Appendices C and D respectively.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was handed down May 12, 1975.

Question Presented

Does due process require a guilty plea to be set aside solely because of a mechanical failure to inform the defendant that intent was an element of the crime to which he pleaded, where the plea is otherwise unassailable and the defendant admits the act charged?

Statement of the Case

A. Facts

On April 7, 1965, Mrs. Ada Francisco of Fulton County, New York, was stabbed over forty times by an assailant. Mrs. Francisco sustained multiple wounds resulting in her death. Respondent, who was arrested and convicted for the crime, was at the time nineteen years old and of limited intelligence. He had been attending Rome State School and was working on the victim's farm. The record is not entirely clear, but evidently a dispute arose between respondent and Ada Francisco, and respondent killed her one evening, took a small sum of money from the house, and fled in a car. Some 100 miles away respondent was involved in an accident and was promptly arrested. Respondent gave confessions.

B. Arraignment

Respondent was indicted for first degree murder,* and on April 15, 1965, was arraigned in the Fulton County Court. At that time, the court assigned two lawyers, Mr. Robert Best and Mr. Floyd Rinehart, to represent respondent. Respondent consulted with his counsel, who were praised by the trial court as very competent men. The indictment for first degree murder was read out, charging respondent with "wilfully . . . and with malice aforethought" stabbing and killing Ada Francisco. Respondent was advised that he was entitled to a jury trial and was entitled to call witnesses in behalf, and he told the court that he understood these rights.

C. Plea

On June 8, 1965,** respondent pleaded guilty to murder in the second degree. According to the prosecutor, this plea was at the request of respondent. Both defense counsel and some members of respondent's family were present. The trial court recognized that it was dealing with a defendant of low intelligence, and was anxious to make sure that respondent genuinely understood what was going on. The respondent stated that he understood that he was accused of killing Ada Francisco, that in pleading guilty he was waiving a trial by jury, that he had consulted with and was pleading with advice of counsel, and that he would be sent to prison.

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* The death penalty was in effect at this time for first degree murder.

** Seven days earlier, the death penalty had been abolished in New York with exceptions not applicable here.

D. Sentence

On June 15, 1965, respondent was sentenced to an indeterminate term of twenty-five years to life. Defense counsel gave a lengthy statement to the court on respondent's background and the circumstances of the crime. He pointed out that respondent was of limited intelligence, had a history of trouble in school, and had developed a belligerent disposition. Respondent was for a time at Rome State School and had been released from there to work for a neighbor, Ada Francisco, on her farm.

According to defense counsel, respondent had developed a liking for a young lady in a nearby village and enjoyed going there on his bicycle to visit her. On several occasions, counsel suggested, respondent had returned home late to the consternation of Mrs. Francisco, who allegedly once slapped him. Hostility grew between respondent and Mrs. Francisco over this problem. Respondent feared he might be returned to Rome State School, and decided to collect the wages due him and leave. When he went to Mrs. Francisco's room with a knife, respondent allegedly meant no harm to her. However, when he woke Mrs. Francisco, she began to scream, and respondent, with his uncontrollable, ungovernable temper and in order to stop the screaming and in all the excitement, committed an "assault" resulting in Mrs. Francisco's death. The District Attorney disputed counsel's version of the facts.

Before passing sentence, the court stated that it had studied the pre-sentence report, a Family Court report, and respondent's records at Rome School. The court noted that respondent had been represented by two highly qualified lawyers, and noted that there had been many conferences on the case so that all the possible facts, psychological, social and legal data had come forth. The court stated that it had analyzed the report of psychiatrists from Utica State Hospital, who, after three weeks of examination, concluded respondent was competent to stand trial and

make his defense. The court appreciated that the case had given defense counsel some difficulties. Finally, the court made it clear that it was aware of respondent's limited intelligence and was taking this into account. The court then passed judgment. The record indicates no surprise or disappointment by respondent or his counsel when the sentence was pronounced.

E. Post Conviction Proceedings in State Court

Respondent took no appeal from his judgment of conviction, nor did he make any motion to withdraw his plea. In August, 1970, more than five years after his conviction, respondent applied for a writ of error coram nobis in Supreme Court, Fulton County, alleging that his plea of guilty was involuntary and not entered knowingly and intelligently in that he was unaware of the consequences of his plea and was unaware that intent was an element of the crime of murder in the second degree. The application was denied in May, 1971, and the Appellate Division affirmed without opinion. *People* v. *Morgan,* 38 A D 2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied in July, 1972.

F. Federal Petition for Habeas Corpus

Respondent then filed a petition for a writ of habeas corpus in December, 1972, challenging his conviction in Fulton County Court for murder in the second degree. Respondent claimed that his plea was entered without knowledge of the consequences of his plea and without knowledge that intent was an element of the crime to which he pleaded.

The United States District Court for the Northern District of New York denied the application by memorandum and decision dated September 26, 1973. (Appendix D). The United States Court of Appeals for the Second Circuit on December 12, 1973, reversed and remanded for an

evidentiary hearing "on the issues raised by respondent, including whether, at the time of his entry of his guilty plea, he was aware that intent* was an element of the crime and was advised of the scope of punishment that might be imposed." (Appendix C).

G. Evidentiary Hearing in Federal Court

At the evidentiary hearing held in Auburn, New York on May 3, 1974, respondent testified that at the time of sentence nearly nine years earlier he did not know what sentence he would receive. In particular, he claimed that he did not know that he would get as much as 25 years to life. According to respondent, had he known what sentence was going to be imposed, he would not have pleaded guilty. He only thought that by pleading to murder in the second degree he would get a lesser sentence, which he expected would be something less than life, the mandatory term for a conviction of murder in the first degree. He claimed he was never told what the lesser sentence would be and said that he never asked what his sentence would be because he assumed his lawyers knew what they were doing.

Respondent also testified that he did not know at the time of his plea that intent was an element of the crime of murder in the second degree, and that had he known this, he would not have pleaded guilty because he did not intend to kill Mrs. Francisco. Respondent said he learned the elements of murder in the second degree from "friends" at Auburn State Prison some five years later.

Respondent's two attorneys in the state court proceedings were called as witnesses by the State. The first, Mr. Rinehart, testified that he was an experienced attorney in criminal law, having practiced over forty years. He was

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* The actual wording of the statute then in effect was "design to effect death". Former New York Penal Law § 1046.

assigned to represent respondent at the arraignment. He discussed the case with his client, the prosecutor, and respondent's family; made various motions, tried to obtain the confessions, and unsuccessfully tried to change venue. He advised respondent that first degree murder at that time was punishable by death. The witness felt that a plea to manslaughter would satisfy the needs of justice, but stated that the prosecutor wouldn't budge. He also testified that in his view of the case, a first degree murder conviction was a distinct possibility. He noted that there was considerable feeling in the community over the killing and that anything might happen.

The witness testified that he discussed the plea to murder in the second degree with respondent's family, and bargained with the prosecutor for a manslaughter plea. By the time of the actual plea to murder in the second degree, the death penalty had been eliminated and respondent was faced with possible alternatives of acquittal or a mandatory life sentence following conviction on a first degree murder trial, or a sentence carrying a minimum of twenty years on a plea to murder in the second degree. The witness knew exactly what the sentence would be on the proposed plea and so advised his client, although when recalled at the close of the hearing he testified that he may have only told respondent "twenty-five years" instead of "twenty-five to life."

Mr. Rinehart testified further that he distinguished first degree and second degree murder by the sentence rather than by the necessary proof, because as a rule a defendant is only interested in the sentence and the time. He did not inform respondent of the elements of the crime. The witness noted that he had obtained the confessions and was familiar with the facts of the case. He stated that his co-counsel talked with respondent more than he did and went very thoroughly into the law.

Respondent's other assigned attorney, Mr. Best, testified that he carefully discussed the facts of the case with re-

spondent and that respondent was told what penalty he would receive in exchange for his plea. He thought, but could not be sure, that he had discussed the elements of the crime with respondent.

During the hearing there was never any claim that the respondent had a credible defense to any homicide charge of which intent was an element. Indeed, at the close of the hearing the District Judge declared that he was satisfied that there was a factual basis for the plea.*

H. Opinion of the District Court and Summary Affirmance by the Court of Appeals

On October 29, 1974, the District Court granted the writ. The District Court found that respondent was advised as to the consequences of his plea, resolving the conflict of testimony on this point in favor of respondent's attorneys and against respondent. However, the District Court found that respondent was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide. The District Court noted that one of respondent's attorneys only *thought* he had so advised respondent. Citing this Court's language in *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969), that "a guilty plea is an admission of all the elements of a formal criminal charge, [and] it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts", the District Court held respondent's plea to be involuntary as a matter of law. The District Court cited no other factors as bearing on the voluntariness of respondent's guilty plea. The State appealed the District Court's decision and judgment to the United States Court of Appeals for the Second Circuit, and on May 12, 1975, that Court affirmed without opinion the decision of the District Court.

* There was clearly a factual basis for the plea under New York Law. Under then New York Law the "design to effect death", former Penal Law § 1046, an element of murder in the second degree, could be evidenced by multiple knife wounds in the decedent. *People* v. *Davis*, 18 A D 2d 644, affd. 13 N Y 2d 1151 (1964). On the other hand, a manslaughter charge based on an act committed in the heat of passion was negated by respondent's carrying a knife to the room. Former Penal Law, § 1050(2).

Reasons Why Certiorari Should Be Granted

This Court should determine whether due process requires a guilty plea to be set aside solely because of a mechanical failure to inform the defendant that intent was an element of the crime to which he pleaded, where the plea is otherwise unassailable and the defendant admits the act charged.

The United States Court of Appeals for the Second Circuit has in this case adopted a *per se* rule that failure to inform the defendant of the elements of the crime to which he pleads automatically renders the plea involuntary as a matter of law, notwithstanding any other relevant circumstances surrounding the plea. This rule, established by the Court of Appeals in the context of federal habeas corpus review which traditionally has been a broad-based canvass for fundamental constitutional errors, is a totally unjustified departure from a basic and long-established constitutional principle regarding guilty pleas as eunciated by this Court. That principle is that the voluntariness of a guilty plea turns on *all* the relevant circumstances surrounding the plea. *Brady* v. *United States*, 397 U.S. 742, 749 (1970).

It is, of course. well settled that a guilty plea must be voluntarily and intelligently made in order to be valid. *Machibroda* v. *United States*, 368 U.S. 487, 493 (1962); *Waley* v. *Johnston*, 316 U.S. 101, 104 (1942); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Kercheval* v. *United States*, 274 U.S. 220, 223 (1927). The difficulty, however, is ascertaining in any given case whether a guilty plea is or is not

voluntary and intelligent. The difficulty is compounded by the myriad circumstances in which guilty pleas are taken.

This Court has addressed itself on several occasions to the problem of ascertaining the voluntariness of guilty pleas in a wide variety of situations. In *McMann* v. *Richardson,* 397 U.S. 759 (1970), this Court held that a plea of guilty based on reasonably competent advice is an intelligent plea not open to attack as being involuntary on the ground that defense counsel may have misjudged the admissibility of the defendant's confession. In *Brady* v. *United States,* 397 U.S. 742 (1970), this Court held that a guilty plea is not invalid merely because entered to avoid the possibility of the death penalty. In *North Carolina* v. *Alford,* 400 U.S. 25 (1970), this Court held that an accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though his guilty plea contains a protestation of innocence, where the record strongly suggests evidence of guilt. In *Boykin* v. *Alabama,* 395 U.S. 238 (1969) and *McCarthy* v. *United States, supra,* this Court enunciated the principle that evidence of voluntariness should be spread upon the record.

Consistently underlying this Court's approach to the problem of ascertaining the voluntariness of guilty pleas in these cases has been the basic principle of flexibility. This Court has wisely refrained from importing rigid *per se* requirements into a difficult and complex field of law. As this Court said in *Brady,* the voluntariness of a plea can be determined only by considering "all of the relevant circumstances." *Brady, supra,* at 749. The obvious advantage of employing a flexible approach is that it achieves consistently just results in an extremely wide variety of factual situations and makes the otherwise elusive concept of voluntariness a meaningful one.

The courts below departed drastically from that principle in this case in holding, in effect, that failure to inform the respondent of the elements of the crime *per se* rendered

his plea involuntary. This was the wrong standard to apply because it excluded from consideration all of the surrounding relevant circumstances. Certainly, as this Court made clear in *McCarthy, supra,* an understanding of the elements of a crime to which a defendant pleads guilty is an important factor to consider in ascertaining the voluntariness of the plea. However, in keeping with its flexible approach to guilty pleas, this Court in *McCarthy* never mandated that an accused be formally advised of all elements prior to a plea, and wisely noted that "matters of reality, and not mere ritual, should be controlling." *McCarthy, supra,* at 468, fn. 20.*

Significantly, no other Court of Appeals has adopted the *per se* rule adopted by the courts below. Those few Circuits that have granted relief for failure of defendants to understand the elements have reached their results in cases where the charge (conspiracy) was complex, *United States* v. *Thomas,* 468 F. 2d 422 (10th Cir. 1972), cert. denied 410 U.S. 935, or where the defendant may have relied on erroneous information provided by the court, *United States* v. *Cantor,* 469 F. 2d 435 (3rd Cir. 1972). The Eighth Circuit in a recent interpretation of *McCarthy* v. *United States, supra,* ruled that there was no ritual requirement to inform a defendant of the elements and that it was not necessary to explain the elements in order to apprise the accused of the nature of the charge. *Sappington* v. *United States,* 468 F. 2d 1378 (8th Cir. 1972), cert. denied 411 U.S. 970. The flexible standard followed in all these cases was discarded by the courts below in favor of a rigid *per se* rule.

The application of a *per se* rule may have grave consequences for the administration of criminal justice. The

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* The courts below also ignored the fact that *McCarthy* is not retroactive. *Halliday* v. *United States,* 394 U.S. 831 (1969). Significantly the District Court itself acknowledged that it was looking at this case in the light of new writings not applicable in 1965.

present case is a classic example of the pitfalls of such a rule. Save for the single alleged failure to inform the respondent of the elements of the crime, all the relevant circumstances point inescapably to a conclusion that the plea was voluntary. Respondent admitted the act charged; respondent never made any claim that he was prejudiced in that he may have had a credible defense to a homicide charge alleging intent; respondent was represented throughout the proceedings by two experienced and competent counsel who spent much time and effort in his behalf; respondent was afforded extensive psychiatric examinations to determine his fitness to proceed; respondent delayed five years before making any of his post-conviction claims; the record indicates no surprise or disappointment by respondent at the time of sentence; a factual basis for the plea is plain on the record; and the record is clear that respondent pleaded guilty to murder in the second degree in order to get a lesser sentence and avoid the risk of conviction for murder in the first degree. The combined weight of all these factors compels a conclusion that the plea was voluntary in any meaningful sense of the word. To hold otherwise, as the courts below did, elevates form over substance and deprives the basic legal concept of voluntariness of all meaning.

Not only does the *per se* rule deprive the concept of voluntariness of substantive meaning and lead to manifestly unjust results, but in effect it imposes a ritual duty on the courts to inform defendants of all elements of the crime in question on the record in every plea in order to insure the validity of the plea and protect it against distant future collateral attack. Such a formal advisement is not required even as to waivers of constitutional rights which this Court has held are inherent in a guilty plea and ought to be spread on the record. *McChesney* v. *Henderson,* 482 F. 2d 1101 (5th Cir. 1973), cert. denied 414 U.S. 1146; *Wade* v. *Coiner,* 468 F. 2d 1059 (4th Cir. 1972); *Todd* v. *Lockhart,* 490 F. 2d 626 (8th Cir. 1974); *Stinson* v. *Turner,* 473 F. 2d 913 (10th Cir. 1973). Furthermore,

since in most jurisdictions intent is an obvious element of nearly every crime except for charges such as manslaughter, it would be futile to require in every case that the defendant be informed of all elements of the crime prior to pleading guilty. It is likely that in the vast majority of guilty pleas no such advisement occurs. Yet, in its absence the *per se* rule adopted by the courts below has opened up to collateral attack untold thousands of otherwise unassailable convictions.

In light of the lower courts' adoption of a *per se* rule in the face of clear authority from this Court that such a rule is inappropriate, and in light of the serious consequences that may flow from adoption of a *per se* rule, the instant case presents this Court with an opportunity to clarify the relative significance of an accused's understanding of the elements of a crime in assessing the voluntariness of his plea. This case, therefore, warrants plenary consideration by this Court.

CONCLUSION

Petitioner's application for certiorari should be granted.

Dated: New York, New York, June 6, 1975.

Respectfully submitted,

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Appendix A.

Decision of United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of May one thousand nine hundred and seventy-five.

Present: HON. IRVING R. KAUFMAN
Chief Judge

HON. WILFRED FEINBERG
Circuit Judge

HON. WILLIAM J. JAMESON
District Judge

75-2017

United States of America, ex rel. Timothy G. Morgan,
Relator-Appellee,

v.

Robert J. Henderson, Superintendent, Auburn Correctional Facility,
Respondent-Appellant.

Appendix A.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

By Vincent A. Carlin,
Chief Deputy Clerk

Appendix B.

Memorandum Decision and Order, October 29, 1974.

UNITED STATES DISTRICT COURT

Northern District of New York

73-CV-440

United States of America ex rel. Timothy G. Morgan,
Relator,

—vs—

Robert J. Henderson, Superintendent, Auburn Correctional Facility,
Respondent.

Edmund Port, Judge

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Appendix B.

Memorandum-Decision and Order

I originally dismissed the above captioned petition by Memorandum-Decision and Order dated September 26, 1973. Upon consideration of a motion made by the relator for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel, the United States Court of Appeals for the Second Circuit, by order dated December 12, 1973, granted a certificate of probable cause and reversed my judgment dismissing the petition and remanded the case "to conduct an evidentiary hearing on the issues raised by petitioner, including whether, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed." The mandate of the Court of Appeals was filed in the office of the Clerk of this court on December 27, 1973. Thereafter, counsel was assigned to relator, an evidentiary hearing held on May 3, 1974 at Auburn, New York, and the matter briefed by the parties hereto. The case is now submitted for decision.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life; no appeal was taken. Relator petitioned for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea taking, failed to ascertain whether or not there was a factual basis for the plea; specifically, relator alleged that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Relator also alleged that the plea was not made with an understanding of the nature of the charges or the consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The state writ was denied without a hearing on June 3, 1971; the Appellate Division affirmed without opinion. *People* v.

Appendix B.

Morgan, 38 A.D.2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. Thereafter, the relator commenced the instant proceeding in this court which was originally dismissed by me and reversed and remanded by the Court of Appeals as aforesaid.

THE HEARING

The hearing was held on May 3, 1974 at Auburn, New York; the petitioner introduced the sentencing and arraignment minutes, and also testified on his own behalf. Petitioner testified that he plead to Murder 2nd degree with the knowledge that he was originally charged with Murder 1st degree; he further testified that he understood that if he had plead guilty as charged he could have received a sentence of life imprisonment. He testified that at no time did anyone explain to him the elements of either first or second degree Murder, and that he would not have plead guilty to second degree Murder if he had known or had been informed that an essential element of that offense was an intent to cause the death or a design to effect the death of the victim, as he had no such intent. He further claimed that he would not have plead guilty to Murder 2nd degree if he had known or had been informed that he could have received the sentence that was imposed upon him; he testified that he had expected a lesser sentence than that imposed.

The principle witness for the respondent was petitioner's assigned co-counsel, Floyd J. Reinhart, Esq.[1] Mr. Reinhart testified that he had engaged in plea bargaining with the District Attorney and had hoped to obtain for petitioner the privilege of pleading guilty to Manslaughter;

[1] Who is an experienced, highly-qualified lawyer in criminal and trial practice.

however, the District Attorney refused to reduce the charge to that extent and insisted upon a plea to Murder 2nd degree. Mr. Reinhart candidly stated that he had never discussed the elements of either first or second degree Murder with the petitioner, and that in his discussions with the petitioner he distinguished the two crimes merely by the type of punishment that could be imposed upon a conviction for the same. Attorney Reinhart did testify that during the period of plea bargaining and prior to the entry of the plea of guilty, he did inform the petitioner that if he plead to Murder 2nd degree he would receive (and which petitioner ultimately received) a sentence of 25 years to life imprisonment; this information was conveyed to the petitioner at various conferences which were also attended by members of petitioner's family.

Robert P. Best, Esq., petitioner's other assigned co-counsel, also testified at the hearing; his testimony corroborated the testimony of Mr. Reinhart and, in addition, he testified that he *thought,* but could not be certain, that he informed petitioner, in the form of a hypothetical case, of the differences between Murder 1st degree, Murder 2nd degree, and Manslaughter. However, upon examining and searching his file he was unable to find any notes substantiating such a conversation with the petitioner.

THE LAW

Boykin v. *Alabama,* 395 U.S. 238 (1969) is not applicable to the instant case. See, e.g., *United States ex rel. Rogers* v. *Adams,* 455 F.2d 1372 (2d Cir. 1970). The standard to be applied to the plea of guilty herein is whether under all the circumstances the petitioner made a reasoned choice, voluntarily, after proper advice, and with a full understanding of the consequences. See *United States ex rel. Codarre* v. *Gilligan,* 363 F.2d 961, 964 (2d Cir. 1966).

DISCUSSION

There are two contentions made by petitioner herein:

(1) That he was never told or advised by counsel or the court of the maximum punishment to which he was subjecting himself by pleading guilty to Murder 2nd degree, and that if he had been told or had known that he would be sentenced to 25 years to life he would not have plead guilty; and

(2) That he was never informed of the elements of the crime to which he plead guilty; specifically, he was not aware that an intent to cause death or a design to effect death had to be present and proved in order to convict him of Murder 2nd degree, and that if he had been so informed, he would not have plead guilty.

In connection with petitioner's first claim, I find that the petitioner knew and had been advised that upon his plea to Murder 2nd degree he would be sentenced to a term of 25 years to life; this was, in fact, the sentence imposed upon petitioner after his plea. In this connection, I credit the testimony of petitioner's two co-counsel on the hearing herein and discredit the petitioner's testimony in this regard. Based upon this finding, I cannot agree that the petitioner's plea was entered in ignorance of its direct consequences insofar as the maximum sentence was concerned; therefore, petitioner's due process rights were not violated in this regard. Cf. *United States ex rel. Leeson* v. *Damon,* 496 F.2d 718 (2d Cir. 1974). Accordingly, petitioner's first claim is without foundation.

In connection with petitioner's second claim however, I find that he was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide nor was he aware of the same; particularly, I find that petitioner was not advised by counsel or court, at any time, that an intent to cause the death or

Appendix B.

a design to effect the death of the victim was an essential element of Murder 2nd degree. As stated by the Supreme Court, "a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy* v. *United States,* 394 U.S. 459, 466 (1969). Based upon the foregoing, I hold as a matter of law that petitioner's plea of guilty was not intelligently or knowingly entered and was, therefore, involuntary. Accordingly, petitioner's plea of guilty to Murder 2nd degree must be set aside as involuntary and unconstitutional.

The foregoing opinion constitutes the court's finding of fact and conclusions of law in accordance with F.R. Civ. P., Rule 52(a).

For the reasons herein, it is

ORDERED, that the conviction challenged herein be and the same hereby is set aside, and it is further

ORDERED, that the respondent Superintendent discharge the petitioner Timothy G. Morgan from custody, unless the State of New York takes such steps as are necessary to return the petitioner to Fulton County for rearraignment; said rearraignment is to be held within 60 days of the date hereof, and it is further

ORDERED, that in the event a timely notice of appeal is filed, execution of the judgment herein be and the same hereby is stayed pending said appeal.

EDMUND PORT
United States District Judge

Dated: October 29, 1974.
Auburn, New York.

Appendix C.

Decision of the United States Court of Appeals for the Second Circuit, dated December 12, 1973.

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Twelfth day of December, one thousand nine hundred and Seventy-three.

United States ex rel. Timothy Gordon Morgan,

Relator-Appellant,

v.

Robert J. Henderson, Superintendent,

Respondent-Appellee.

A motion having been made herein by relator pro se for a certificate of probable cause, for leave to proceed in forma pauperis and for the assignment of counsel.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is GRANTED to the extent that a Certificate of Probable Cause shall

Appendix C.

issue. Dismissal of the petition is reversed. The case is remanded to the district court to conduct an evidentiary hearing on the issues raised by petitioner, including whether, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime and was advised of the scope of the punishment that might be imposed. The district court is instructed to appoint counsel to represent petitioner.

IRVING R. KAUFMAN,
Chief Judge.

IRK WRM WHM

WALTER R. MANSFIELD,

WILLIAM H. MULLIGAN,
Circuit Judges.

Appendix D.

Memorandum-Decision and Order, September 26, 1973.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

73-CV-

UNITED STATES OF AMERICA ex rel. TIMOTHY G. MORGAN,
Relator,

vs.

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,
Respondent.

EDMUND PORT, Judge

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration a petition for a writ of federal habeas corpus, together with an affidavit in forma pauperis and for the assignment of counsel, from a state inmate presently confined in the Auburn Correctional Facility.

The relator alleges that he plead guilty in the Fulton County Supreme Court on June 8, 1965, to Murder 2nd degree and was sentenced on June 15, 1965, to a term of 25 years to life. No appeal was taken. Relator did bring a petition for a writ of error coram nobis in the Fulton County Supreme Court on the ground that the trial court, at the plea taking, failed to ascertain whether or not there was a factual basis for the plea. Specifically, relator

alleges that the court made no attempt to ascertain whether or not the essential element of "a design to effect the death of the person killed" was present. Relator also alleged that the plea was not made with an understanding of the nature of the charges or the consequences of the plea, due, in part, to his I.Q. which is alleged to be between 68-75. The writ was denied without a hearing on June 3, 1971. The Appellate Division affirmed without opinion. *People* v. *Morgan,* 38 App. Div. 2d 1012 (3rd Dept. 1972). Leave to appeal to the Court of Appeals was denied on July 6, 1972. The petitioner has supplied this court with copies of his brief and record on appeal, as well as the brief of the People.

Boykin v. Alabama, 395 U.S. 238 (1969) is not applicable to the instant case. See, e.g., *United States ex rel. Rogers* v. *Adams,* 435 F.2d 1372 (2d Cir. 1970). The standard to be applied to the guilty plea herein is whether Morgan made a reasoned choice, voluntarily after proper advice and with a full understanding of the consequences. See *United States ex rel. Codarre* v. *Gilligan,* 363 F.2d 961, 964 (2d Cir. 1966).

An examination of the record on appeal demonstrates a protective and solicitous attitude, on the behalf of the court, toward the defendant's interests. For instance, at the defendant's arraignment on April 15, 1965, in the Fulton County Supreme Court, the court appointed the two attorneys[1] that the defendant wished to represent him.[2] In addition, at arraignment, the court indicated every willingness to make itself and official records of the defendant readily available to defendant's counsel. The

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[1] Robert Best, Esq., and Floyd Reinhart, Esq. The latter was reported to have been one of the ablest and most competent trial attorneys in the area.

[2] Minutes of Arraignment, p. 4.

[3] See *Minutes of Arraignment,* pp. 8-11.

court's concern regarding the defendant's background and its investigation of his circumstances and situation is further revealed in the trial judge's comments on the sentencing.[4]

On arraignment the indictment for Murder 1st degree was read to the defendant in the presence of his two attorneys,[5] and the court explained to the defendant his right to a jury trial and to subpoena witnesses in his behalf and that a plea of guilty would be the same as being convicted after a trial by a jury.[6] The defendant affirmatively indicated that he understood what the court had told him.[7]

It should also be noted that a psychiatric examination of the defendant was ordered by the court, and that as a result thereof, he was found competent to stand trial, capable of understanding the charge against him, and of assisting in his defense.[8]

On the taking of the plea of guilty on June 8, 1965, the court made a special effort to emphasize to the defendant the gravity and importance of his change of plea.[9] The court asked the defendant[10] whether he understood: a) that he was accused of killing the victim, b) that a plea of guilty was the same as being convicted after a jury trial of Murder 2nd degree, and c) that he would be sentenced to prison. The defendant answered in the affirmative to each of these questions.[11] In addition, the trial judge asked the

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[4] See *Minutes of Sentence,* pp. 40-43.

[5] *Minutes of Arraignment,* p. 5.

[6] *Minutes of Arraignment,* pp. 5-7.

[7] *Minutes of Arraignment,* pp. 6-7.

[8] See *Plea Minutes,* p. 18 and *Sentence Minutes,* p. 41.

[9] *Plea Minutes,* p. 9.

[10] See pp. 21-23 of *Sentence Minutes.*

[11] I do.

defendant if he fully understood what he was doing and if he was doing this voluntarily and upon the advice of counsel; the defendant again responded in the affirmative.[12] Further, defendant's mother and two brothers were present with him in the courtroom when he changed his plea to guilty.[13]

An examination of the sentence proceeding of June 15, 1965 easily reveals that the defendant's attorneys had made a full and complete investigation of the case before advising him to plead guilty to the lesser charge.[14]

Finally, it should be noted that petitioner did not raise any challenge to his plea until five years after he had been sentenced.

After an examination of all the papers herein and a consideration of all the circumstances surrounding the taking of the plea, I am convinced that Morgan made a reasoned choice; voluntarily and after proper advice from competent counsel, and with a recognition that said choice would result in a prison term. Therefore, I do not find that petitioner was deprived of due process of law and the petition herein will be denied and dismissed.

For the reasons herein, it is

ORDERED, that the petition herein be and the same hereby is denied and dismissed. Leave to proceed in forma pauperis is granted and the Clerk is directed to file the papers herein without the payment of fees.

EDMUND PORT
United States District Judge

Dated: September 26, 1973.
Auburn, New York.

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[12] See p. 23 of *Plea Minutes.*

[13] See p. 25 of *Plea Minutes.*

[14] See pp. 28-35 of *Sentence Minutes.*

Appendix E.

Notice of Appeal, dated November 6, 1974.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. TIMOTHY G. MORGAN,
Relator,

—against—

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,
Respondent.

PLEASE TAKE NOTICE that the Superintendent of Auburn Correctional Facility, Auburn, New York, hereby appeals to the United States District Court of Appeals for the Second Circuit from the order made October 29, 1974 and filed in the office of the Clerk of this court. The order sustained the writ of habeas corpus and set aside the conviction challenged by the petitioner.

The petitioner is confined at Auburn Correctional Facility, Auburn, New York.

Dated: November 6, 1974

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By s/ JOSEPH R. CASTELLANI
JOSEPH R. CASTELLANI
Assistant Attorney General

Appendix E.

To: Hon. Joseph R. Scully, Clerk
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Timothy G. Morgan
Auburn Correctional Facility
Auburn, New York 13021